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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

COLIN FRASER, Individually and on Behalf  
of All Others Similarly Situated,

Plaintiff,

vs.

ASUS COMPUTER INTERNATIONAL, et  
al.,

Defendants.

No. 12-cv-00652-WHA

CLASS ACTION

PLAINTIFF'S UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT, CERTIFICATION  
OF THE SETTLEMENT CLASS, SETTING  
A HEARING ON FINAL APPROVAL OF  
SETTLEMENT, AND DIRECTING NOTICE  
TO THE CLASS AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT

DATE: November 1, 2012

TIME: 8:00 a.m.

CTRM: 8

JUDGE: Hon. William H. Alsup

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4 William B. Rubenstein, Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS  
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Please take notice that on November 1, 2012 at 8:00 a.m. in Courtroom 8 before the Honorable William H. Alsup, pursuant to Rule 23(c)(2) and (e) of the Federal Rules of Civil Procedure, Plaintiff hereby moves, unopposed, for preliminary approval of a class action settlement. This motion is made on the grounds that the parties have reached a settlement of this action for which preliminary approval is required. A copy of the Settlement Agreement and exhibits thereto are attached to the accompanying memorandum in support as Exhibit 1.

This motion is based on this notice of motion, the accompanying memorandum, the Settlement Agreement and exhibits attached thereto as Exhibit 1, and the Declarations of plaintiff's lead counsel Mark Dearman and Seth Lehrman, attached to the memorandum as Exhibits 2 and 3, respectively. This motion is further based on the papers on file in this action and such oral or documentary evidence that may be presented at the hearing of this motion.

#### **I. BACKGROUND OF LITIGATION AND SETTLEMENT**

Plaintiff Colin Fraser ("Plaintiff") respectfully submits this memorandum in support of his Unopposed Motion for Preliminary Approval of Class Action Settlement under Rule 23(c)(2) and (e) of the Federal Rules of Civil Procedure.<sup>1</sup> The parties resolved this Action after months of negotiation, exchanges of information, retention of a joint, independent expert, and the mediation expertise of Magistrate Judge Corley.

Plaintiff brought this putative class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of himself and all others similarly situated as a member of the following class (the "Class"): All United States residents who purchased an Asus Transformer Prime Eee TF-201 Tablet ("Transformer Prime") and who have not already returned their device for a full refund. The Settlement Class excludes Asus; any entity in which Asus has a controlling interest; Asus' directors, officers, and employees; and Asus' legal representatives, successors, and assigns. In this case,

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<sup>1</sup> Colin Fraser is the plaintiff in this Action; (the "Action"). Herbert V. Veith, Nicholas Balog, and Bill Vance are cooperating Class Members who spent a considerable amount of time and effort assisting Proposed Class Counsel in the preparation of a multi-state consolidated complaint which, due to the proposed settlement, was never filed.

1 Plaintiff challenges Defendants' actions in connection with their marketing, advertising, and sale of  
2 the Transformer Prime, which Plaintiff alleged was defective.

3 Asus designed, manufactured, marketed, advertised, and warranted the Transformer Prime to  
4 consumers nationwide. In conjunction with each sale, Defendants marketed, advertised, and  
5 warranted, among other things, that each Transformer Prime included a global positioning system  
6 ("GPS"), satellite-based navigation, and wireless ("WiFi") capabilities, and was otherwise fit for the  
7 ordinary purpose for which such goods are used and was free from defects in materials and  
8 workmanship. *See* Complaint [Dkt. No. 1].

9 More specifically, Plaintiff alleges that the Transformer Prime contains a defect that results  
10 in the significant loss or reduction of GPS because it was designed and manufactured with a metallic  
11 unibody design. That is, the metallic properties of the design impede the performance of the GPS  
12 when the device receives signals from satellites, and was reported to cause the WiFi to become  
13 unreliable and weak. Indeed, following several media reports and consumer complaints regarding  
14 the problems with the GPS functionality on the Transformer Prime, Asus publicly acknowledged on  
15 its Facebook page that the defect did, in fact, exist.

16 On this basis, Plaintiff alleged seven causes of action in his Complaint, including violations  
17 of various common laws and California consumer protection laws.

18 **A. Procedural History of the Action**

19 On February 9, 2012, Plaintiff filed the Action. On April 30, 2012, Defendants filed a  
20 comprehensive motion to dismiss attacking each and every cause of action and the viability of  
21 proceeding with a nationwide class action [Dkt. No. 17]. On several occasions, counsel for the  
22 parties met and conferred on the issues raised in the motion to dismiss, including an in-person  
23 meeting held on April 18, 2012. On May 4, 2012, Plaintiff filed a motion to be appointed as interim  
24 class counsel [Dkt. No. 24] and on May 30, 2012, the Court entered an order temporarily appointing  
25 Stuart A. Davidson and Mark Dearman of Robbins Geller Rudman & Dowd LLP, and Steven R.  
26 Jaffe and Seth M. Lehrman of Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L., as Interim  
27 Lead Counsel [Dkt. No. 36]. Subsequently, the parties requested an extension of the Interim Class  
28 Counsel appointment and, with the approval of Magistrate Judge Corley, the Court extended the



1 temporary appointment until August 9, 2012 [Dkt. No. 39]. Thereafter, on August 9, 2012, the  
2 parties filed a stipulation requesting a second extension of the Interim Class Counsel appointment to  
3 permit counsel to file the instant motion, which the Court granted [Dkt. No. 43].

4 **B. The Mediation Process with Judge Corley**

5 Once appointed as Interim Class Counsel and pursuant to guidance provided by this Court,  
6 Plaintiff and Asus agreed to mediate the issues set forth in the Complaint before Magistrate Judge  
7 Corley. The settlement discussions included two in-person, arm's-length mediations along with  
8 numerous telephonic settlement conferences. The first in-person settlement conference took place  
9 on June 7, 2012, and lasted several hours [Dkt. No. 37]. The second settlement conference took  
10 place on July 20, 2012, and also lasted several hours [Dkt. No. 40]. Following both settlement  
11 conferences, additional discussions and settlement negotiations were held between counsel for the  
12 parties under the auspices of Judge Corley.

13 During the mediation process, Asus provided relevant documents and information to Plaintiff  
14 regarding the core issues of the case, including causation, manufacturing, marketing, and sales data.  
15 Additionally, Dominique M. Hanssens, Professor of Marketing at the UCLA Anderson School of  
16 Management in Los Angeles, California, was jointly retained by counsel for the parties and, through  
17 an independent expert report and opinion, assisted the parties in determining a range of reasonable  
18 values for the loss of GPS functionality. Dr. Hanssens opined that the reasonable range for the  
19 monetary value of the defect of the GPS functionality in the Transformer Prime is \$7.49 - \$17.47 per  
20 unit. Thus, a \$17.00 cash payment is at the top of the established range.

21 As to WiFi, documents received from Asus confirmed that the performance of the  
22 Transformer Prime's WiFi is within a range of acceptable performance for tablets. In addition, Asus  
23 has agreed to provide additional discovery to Plaintiff on the WiFi issue prior to the hearing on  
24 preliminary approval.

25 As a result of the exchange of documentation and information, the joint retention and opinion  
26 of Professor Hanssens, and the expertise of Magistrate Judge Corley, the parties were able to reach  
27 an agreement to resolve this Action on the evening of August 8, 2012, which was announced to the  
28 Court on August 9, 2012. The proposed Settlement Agreement is attached hereto as Exhibit 1.

1 This Court set the preliminary approval hearing for November 1, 2012, at 8:00 a.m.

2 **C. Summary of the Proposed Settlement<sup>2</sup>**

3 The parties' Settlement Agreement proposes certification of a Settlement Class consisting of:

4 All United States residents who purchased an Asus Transformer Prime Eee TF-201  
5 Tablet and who have not already returned their device for a full refund. The  
6 Settlement Class excludes Asus; any entity in which Asus has a controlling interest;  
Asus' directors, officers, and employees; and Asus' legal representatives,  
successors, and assigns.

7 The parties estimate that there are over 130,000 members of the proposed Settlement Class.

8 **1. Individual Class Member Benefits**

9 As more fully set forth in the Settlement Agreement (Ex. 1 hereto), the proposed settlement  
10 provides substantial benefits to proposed Class Members, including, but not limited to, the  
11 following:

12 **a. Cash**

13 \$17 Cash Payment to Eligible Settlement Class Members who file a valid, extremely  
simplified Claim Form.

14 **b. Free Dongle**

15 A free Asus GPS extension kit or Dongle as described at  
16 <http://event.asus.com/ASUSPad/TF201GPS/>, which will remain available during the  
Claims Period.

17 **2. Notice**

18 The parties' proposed notice plan is exceptionally robust and easily meets the requirements  
19 of due process and Rule 23. The Settlement Agreement recommends that notice of this proposed  
20 settlement be disseminated to proposed Settlement Class Members, at Asus' sole expense, as  
21 follows:

22 **a. Mailing**

23 A copy of the Notice of Pendency and Proposed Settlement of Class Action,  
24 substantially in the form attached to the Settlement Agreement as Exhibit A (the  
"Class Notice"), together with the Claim Form (including the Instructions, Claim  
25 Form, and Release), substantially in the form attached to the Settlement Agreement  
as Exhibit C, shall be posted and available for download on a Settlement Website,  
26 and shall be mailed at no charge to Class Members who call a toll-free number to be  
established at Asus' expense ("Toll-Free Number"). This information shall remain  
available on the Settlement Website until the last day of the Claims Period. All costs

27  
28 <sup>2</sup> All terms herein are given the same meaning as defined in the parties' Settlement Agreement.

1 and expenses associated with complying with this provision shall be borne  
2 exclusively by Asus.

3 **b. Pushed to Device**

4 Asus shall also send Notice to each Class Member, by pushing a copy of the  
5 Summary Notice substantially in the form attached to the Settlement Agreement as  
6 Exhibit B to each Class Member's Transformer Prime Tablet. The Summary Notice  
7 shall: (i) notify Settlement Class Members about the benefits available through the  
8 settlement; (ii) provide the Settlement Website address with a description that the  
9 Class Notice and Claim Form are available on the Settlement Website; (iii) provide  
10 the Toll-Free Number where Settlement Class Members can call to obtain a Class  
11 Notice and Claim Form; and (iv) inform Settlement Class Members of the Asus  
12 Dongle Program described in Section C(1)(b) above. All costs and expenses  
13 associated with complying with this provision shall be borne exclusively by Asus.

14 **c. Internet**

15 Asus shall cause a copy of the Summary Notice to be published on its own website  
16 and Facebook page. A Settlement Website will also be established on the Internet  
17 where Class Members may view and download the Settlement Notice and Claim  
18 Form and obtain answers to Frequently Asked Questions.

19 **D. Actions Requested of the Court**

20 By this motion, Plaintiff respectfully requests the Court to enter a Conditional Approval  
21 Order granting preliminary approval of the proposed settlement in the form accompanying this  
22 motion, which is substantially in the form attached as Exhibit D to the Settlement Agreement. That  
23 Order would authorize the tasks necessary to allow the proposed settlement approval process to  
24 commence. Those tasks include: (1) conditionally certifying the proposed Settlement Class; (2)  
25 preliminarily approving the Settlement Agreement; (3) approving and authorizing dissemination of  
26 Class Notice to the proposed Settlement Class Members; (4) establishing a schedule by which  
27 Settlement Class Members may exclude themselves from the Settlement Class or object to any  
28 aspect of the proposed settlement; (5) appointing Class Counsel and the Class Representative; and  
(6) setting a date for a Fairness Hearing.<sup>3</sup>

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<sup>3</sup> Proposed Class Counsel is not requesting the Court to consider attorneys' fees or reimbursement of expenses at preliminary approval. Instead, Proposed Class Counsel will seek an award of attorneys' fees and expenses after the Claims Period has expired and on the Final Approval Hearing Date.

1 **II. THE COURT SHOULD PRELIMINARILY CERTIFY THE PROPOSED**  
 2 **SETTLEMENT CLASS**

3 Plaintiff requests that the Court provisionally certify this Action as a class action under Rule  
 4 23(b)(3) for the purpose of settlement. This Court has recently articulated the standard for class  
 5 certification in connection with a motion for preliminary approval of a class action settlement:

6 “A party seeking class certification must affirmatively demonstrate his compliance  
 7 with [Rule 23]—that is, he must be prepared to prove that there are *in fact*  
 8 sufficiently numerous parties, common questions of law or fact, etc.” *Wal-Mart*  
 9 *Stores, Inc. v. Dukes*, — U.S. —, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374  
 10 (2011) (emphasis in original). The party seeking class certification bears the burden  
 11 of showing that each of the four requirements of Rule 23(a) and at least one of the  
 requirements of Rule 23(b) are met. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022  
 (9th Cir. 1998). Pursuant to Rule 23(a), for a named plaintiff to obtain class  
 certification, the court must find: (1) numerosity of the class, (2) common questions  
 of law or fact, (3) that the named plaintiff’s claims and defenses are typical of the  
 claims or defenses of the class, and (4) that the named plaintiff and plaintiff’s counsel  
 can adequately protect the interests of the class.

12 *Vallabhapurapu v. Burger King Corp.*, No. C 11-00667 WHA, 2012 WL 2568183, at \*2 (N.D. Cal.  
 13 July 2, 2012) (Alsup, J.).<sup>4</sup>

14 That is, “[t]he judge should make a preliminary determination that the proposed class  
 15 satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b).”  
 16 MANUAL FOR COMPLEX LITIGATION (FOURTH) §21.632; *see also* 4 William B. Rubenstein, Alba  
 17 Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS §11.25 (4th ed. 2010).

18 Provisional certification is an appropriate device where an agreement to settle occurs before a  
 19 class is certified for litigation. *See, e.g., Jaffe v. Morgan Stanley & Co., Inc.*, No. C-06-3903 TEH,  
 20 2008 WL 346417, at \*2-\*3 (N.D. Cal. Feb. 7, 2008); *In re Portal Software, Inc. Sec. Litig.*, No. C-  
 21 03-5138 VRW, 2007 WL 1991529, at \*2-\*3 (N.D. Cal. June 30, 2007). Although Asus would, if  
 22 class certification were contested on the merits, argue otherwise, the parties have agreed for purposes  
 23 of settlement that the proposed Settlement Class may be certified under Rule 23(b)(3). The  
 24 Settlement Agreement and the proposed notices provide that Settlement Class Members will have  
 25 the opportunity to exclude themselves from the Settlement Class as Rules 23(c)(2)(B)(v) and  
 26 23(e)(4) require.

27 \_\_\_\_\_  
 28 <sup>4</sup> Internal citations and quotations omitted and emphasis added, unless otherwise noted.

1           **A.       The Numerosity Requirement Is Met**

2           Rule 23(a)(1) allows a class action to be maintained if “joinder of all members is  
3 impracticable” owing, in primary part, to the large number of people in the proposed class. Fed. R.  
4 Civ. P. 23(a)(1); *see also Hanlon*, 150 F.3d at 1019. Generally, the numerosity requirement is  
5 satisfied when the class comprises 40 or more members. *Celano v. Marriot Int’l, Inc.*, 242 F.R.D.  
6 544, 549 (N.D. Cal. 2007). Here, Defendants sold 133,306 Transformer Prime tablets, not including  
7 returned units, in the United States. Size renders joinder impracticable here, and, Plaintiff believes,  
8 satisfies the numerosity requirement. *See Hanlon*, 150 F.3d at 1019.

9           **B.       The Commonality Requirement Is Met**

10          Rule 23(a)(2) allows a class action to be maintained if “there are questions of law or fact  
11 common to the class.” “The existence of shared legal issues with divergent factual predicates is  
12 sufficient, as is a common core of salient facts coupled with disparate legal remedies within the  
13 class.” *Hanlon*, 150 F.3d at 1019. Here, all proposed Class Members are Transformer Prime  
14 owners.

15          Plaintiff alleges the same legal theories for all proposed Class Members:

16               (a)     whether Defendants were negligent in the design, manufacturing, and  
17 distribution of the Transformer Prime;

18               (b)     whether the Transformer Prime designed, manufactured, marketed,  
19 distributed, or sold by Defendants was unfit for its intended purpose and use because of its design;

20               (c)     whether Defendants breached any warranties in selling the Transformer  
21 Prime;

22               (d)     whether Defendants intentionally or negligently misrepresented material facts  
23 relating to the character and quality of the Transformer Prime;

24               (e)     whether Defendants engaged in false or deceptive advertising;

25               (f)     whether Defendants knew that their representations were false, misleading,  
26 and reasonably likely to deceive but continued to disseminate them;

27               (g)     whether Defendants violated various state consumer protection laws as set  
28 forth herein;

- 1 (h) whether Defendants were unjustly enriched by its acts complained of herein;
- 2 (i) whether Plaintiff and the Class have sustained monetary loss and the proper
- 3 measure of that loss;
- 4 (j) whether Plaintiff and the Class are entitled to punitive damages; and
- 5 (k) whether Plaintiff and the Class Members are entitled to declaratory and
- 6 injunctive relief.

7 Thus, these common contentions are “capable of classwide resolution.” *Dukes*, 131 S. Ct. at 2551.  
 8 Accordingly, Plaintiff believes the commonality requirement is satisfied.

9 **C. The Typicality Requirement Is Met**

10 Rule 23(a)(3) requires that “the claims or defenses of the representative parties [must be]  
 11 typical of the claims or defenses of the class.” “The test of typicality is whether other members have  
 12 the same or similar injury, whether the action is based on conduct which is not unique to the named  
 13 plaintiffs, and whether other class members have been injured by the same course of conduct.”  
 14 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). “[U]nder the rule’s permissive  
 15 standards, representative claims are ‘typical’ if they are reasonably co-extensive with those of absent  
 16 class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020.

17 Here, Plaintiff, as the proposed Class Representative, testified at deposition that he  
 18 experienced difficulties using the Transformer Prime’s GPS and WiFi and shares an interest in  
 19 redressing those claims with all proposed Class Members. Thus, Plaintiff believes his claims are  
 20 typical of those of the proposed Settlement Class, and Fed. R. Civ. P. 23(a)(3) is met.

21 **D. Plaintiff and Class Counsel Are Adequate**

22 Finally, Rule 23(a)(4) and Rule 23(g) together require that the named plaintiff and proposed  
 23 class counsel be able to “fairly and adequately protect the interests of the class.” “Resolution of two  
 24 questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts  
 25 of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the  
 26 action vigorously on behalf of the class?” *Hanlon*, 150 F.3d at 1020.

27 Here, neither Plaintiff nor his counsel have any interests antagonistic to the proposed  
 28 Settlement Class. Furthermore, Plaintiff and Proposed Class Counsel have vigorously prosecuted

1 this Action on behalf of the proposed Settlement Class, including filing and service of the lawsuit,  
 2 filing initial disclosures, initiating and engaging in arm's-length settlement negotiations with defense  
 3 counsel, requesting confidential documents and data from Asus, analyzing the documents and data  
 4 Asus provided, retention of a joint expert with Asus, and moving the Action forward to excellent  
 5 resolution. The attorneys who represent the proposed Class Representative are well-qualified to  
 6 serve as Class Counsel and indeed have handled similar nationwide high technology class actions to  
 7 successful resolution in the past. The qualifications and experience of Proposed Class Counsel are  
 8 set forth in the Declarations of Mark Dearman and Seth Lehrman, attached hereto as Exhibits 2 and  
 9 3, respectively.

10 **E. The Proposed Settlement Class Meets the Requirements of Rule**  
 11 **23(b)(3)**

12 Once subsection (a) prerequisites are satisfied, Fed. R. Civ. P. 23(b)(3) provides that a class  
 13 action can be maintained where the questions of law and fact common to members of the class  
 14 predominate over any questions affecting only individuals, and the class action mechanism is  
 15 superior to the other available methods for the fair and efficient adjudication of the controversy.  
 16 *Pierce v. County of Orange*, 526 F.3d 1190, 1197 n.5 (9th Cir. 2008). Because settlement is  
 17 proposed, the Court need not consider manageability. *See Amchem Prods., Inc. v. Windsor*, 521 U.S.  
 18 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court  
 19 need not inquire whether the case, if tried, would present intractable management problems, for the  
 20 proposal is that there be no trial.").

21 The predominance inquiry looks to whether a proposed class is sufficiently cohesive to  
 22 warrant adjudication by representation. *Id.* at 623. Common issues predominate where a common  
 23 nucleus of facts and potential legal remedies dominate the litigation. *See Chamberlan v. Ford Motor*  
 24 *Co.*, 402 F.3d 952, 962 (9th Cir. 2005). Here, Plaintiff's claims arise out of the same set of operative  
 25 facts and are premised on the same legal theories. For settlement purposes, where the manageability  
 26 of trying the case need not be considered, the predominance requirement is satisfied.

27 In addition, a class action is superior to any other method available to fairly, adequately, and  
 28 efficiently resolve the proposed Settlement Class Members' claims. Without a class action, most



would find litigation costs prohibitive, and if they did sue in large numbers, multiple individual actions would be an inefficient use of the Court's and parties' resources. Accordingly, Plaintiff believes a class action is the superior method of adjudicating this controversy.

**III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT AGREEMENT AS "FAIR, REASONABLE, AND ADEQUATE" UNDER FED. R. CIV. P. 23(e)(2)**

Following certification for settlement purposes, Rule 23(e) requires that the Court make a preliminary determination of fairness:

Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by the parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. ... The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

MANUAL FOR COMPLEX LITIGATION (FOURTH) §21.632; see also 4 NEWBERG ON CLASS ACTIONS §11.25.

After the preliminary fairness evaluation has been made, the class has been certified for settlement purposes, and notice has been issued, the Court holds a Fairness Hearing to show that the proposed settlement is truly fair, reasonable, and adequate. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) §21.633-34; 4 NEWBERG ON CLASS ACTIONS §11:25.

Preliminary approval requires only that the Court evaluate whether the proposed settlement: (1) was negotiated at arm's-length, and (2) is within the range of possible litigation outcomes such that "probable cause" exists to disseminate notice and begin the formal fairness process. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) §21.632-33. The Ninth Circuit has identified a number of factors used to assess whether a settlement proposal is fundamentally fair, adequate, and reasonable: (1) the strength of the plaintiffs' case and the risk, expense, complexity, and likely duration of further litigation; (2) the amount offered in settlement; (3) the extent of discovery completed and the stage of the proceedings; (4) the experience and views of counsel; (5) the reaction of the class members to the proposed settlement; and (6) any collusion between the parties. *See In re*



1 *Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458-60 (9th Cir. 2000). To preliminarily assess the  
 2 reasonableness of the parties' proposed settlement, the Court should review both the substance of the  
 3 deal and the process utilized to arrive at the settlement. *See In re Tableware Antitrust Litig.*, 484 F.  
 4 Supp. 2d 1078, 1080 (N.D. Cal. 2007) ("preliminary approval . . . has both a procedural and a  
 5 substantive component"). Each relevant factor supports the conclusion that the proposed settlement  
 6 is fundamentally fair, adequate, and reasonable.

7 **A. The Strength of Plaintiff's Case and the Risk, Expense, Complexity,**  
 8 **and Likely Duration of Further Litigation**

9 The heart of Plaintiff's claim is that Asus' Transformer Prime contains a defect that results in  
 10 the reduction and/or elimination of GPS and that the WiFi reception and performance can be  
 11 intermittent or weak. While Plaintiff and Proposed Class Counsel believe that their claims are  
 12 meritorious and qualify for litigation on a class-wide basis, Asus has raised and would continue to  
 13 raise challenges to the claims' legal and factual bases, as well as the propriety of class certification.  
 14 Although the parties differ as to the likelihood of Plaintiff ultimately prevailing on his motion for  
 15 class certification and after judgment and appeal, it is apparent that the proposed Class has some risk  
 16 with proceeding to litigate.

17 By contrast, the proposed settlement immediately provides the certainty of valuable benefits  
 18 to the proposed Class Members. Among other benefits, the proposed settlement offers all proposed  
 19 Class Members \$17.00 in cash and the right to receive a free "dongle" for an additional three months  
 20 following the Notice Date. *See, supra*, at 3.

21 If this case is not settled, it would be necessary to continue prosecuting the litigation through  
 22 class certification, a trial and, even if successful there, through a potential appeal. There is certainty  
 23 that any potential benefits to the proposed Class would be delayed for months or years if the case  
 24 proceeds in litigation.

25 This Settlement Agreement, like all settlements, strikes a balance between the maximum  
 26 possible recovery that the proposed Class might obtain by pursuing litigation to the very end, and the  
 27 risk of failing to obtain any recovery should Asus prevail in litigation. In determining whether the  
 28 terms of this Settlement Agreement are sufficiently fair, adequate, and reasonable to justify the

1 dissemination of Class Notice and the scheduling of a Fairness Hearing, the Court need only inquire  
 2 at this juncture whether the consideration provided to the proposed settlement falls within the  
 3 reasonable range of settlement “by considering the likelihood of a plaintiffs’ or defense verdict, the  
 4 potential recovery, and the chances of obtaining it, discounted to present value.” *Rodriguez v. West*  
 5 *Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (citing MANUAL FOR COMPLEX LITIGATION  
 6 (FOURTH) §21.62). The answer to that question is most certainly “yes.”

7 The advantages to the proposed Class Members of approving the proposed settlement and  
 8 quickly distributing to them the consideration provided exceeds what is likely to occur should this  
 9 case proceed on a litigation track. For this reason, the strength of Plaintiff’s case and the risk,  
 10 expense, complexity, and likely duration of further litigation suggest that the proposed Settlement  
 11 Agreement is fair, reasonable, and adequate under Fed. R. Civ. P. 23(e)(2).

#### 12 **B. The Amount Offered in Settlement**

13 In light of the uncertainties of litigation, the value of the proposed settlement offer is  
 14 certainly adequate, if not excellent. Asus will provide all proposed eligible Settlement Class  
 15 Members a \$17.00 cash payment, which is at the very high end of the range of diminution of value  
 16 of the Transformer Prime with the GPS defect as opined by Professor Hanssens. Plaintiff’s  
 17 counsel’s preliminary investigation reflects that the dongle’s retail value exceeds \$10 and Plaintiff  
 18 has requested additional discovery to corroborate the accuracy of this preliminary estimate. As  
 19 noted, the cash portion of the settlement was selected, in part, based on the independent analysis  
 20 performed by Dr. Hanssens, who assisted the parties in determining a range of reasonable values for  
 21 the loss of GPS functionality and prepared an independent report regarding same. Dr. Hanssens  
 22 opined that the reasonable range for the monetary value of the defect of the GPS functionality in the  
 23 Transformer Prime is \$7.49 - \$17.47. The \$17.00 cash payment is at the top of this range.

#### 24 **C. The Scope of Release**

25 The scope of release is sufficiently narrow. Settlement Class Members who do not opt out of  
 26 the settlement will release only those claims that were asserted in the instant Action.

**D. The Extent of Discovery Completed and the Stage of Proceedings**

The amount of discovery obtained prior to settlement is a factor in determining the fairness of settlement. *See Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003), cited in *Rodriguez*, 563 F.3d at 963 (“the extent of discovery completed and the stage of the proceedings” are factors in considering the fairness of a proposed settlement). Here, as the courts have repeatedly encouraged, the parties reached settlement relatively early in the litigation. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1225 (9th Cir. 1989) (“In general, the policy of federal courts is to promote settlement before trial. ‘Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible.’”) (citing Fed. R. Civ. P. 16(c), advisory committee note); *In re M.D.C. Holdings Sec. Litig.*, No. CV89–0090 E (M), 1990 WL 454747, at \*7 (S.D. Cal. Aug. 30, 1990) (“The judicial system and the public benefit from such prompt resolution of complex, potentially protracted litigation. Early resolution of complex cases is therefore much to be desired. It avoids having the court deal with all the problems a protracted, complex case can create and frees its resources so that other matters can be processed more expeditiously. Early settlements benefit everyone involved in the process and everything that can be done to encourage such settlements—especially in complex class action cases—should be done.”).

Nevertheless, Plaintiff’s counsel did, in fact, obtain hundreds of pages of detailed confidential information regarding the Transformer Prime’s design, testing, and sales, among other things, from a confidential information exchange during settlement negotiations with defense counsel that began in April 2012 and continued for months thereafter. In addition, prior to the preliminary hearing, Asus will provide additional confirmatory discovery in order to continue to confirm the fairness, reasonableness, and adequacy of the proposed settlement, which such discovery shall include, but not be limited to: (1) class size; (2) the Dongle and the Asus Dongle Program; and (3) WiFi-related issues. This discovery will be completed before the November 1, 2012 preliminary approval hearing date.

**E. The Experience and Views of Counsel**

Proposed Class Counsel believe, based on their extensive past experience in class action cases, that the proposed settlement, rather than continued litigation, is undoubtedly the best option for the proposed Settlement Class. To be sure, it is unlikely that Plaintiff and Proposed Class Counsel would be able to obtain much more from a trial than the Class will receive in this proposed settlement, as \$17.00 in cash is at the high end of the range of values for the GPS defect.

Proposed Class Counsel's collective experience suggests that the parties' settlement is a strong result for the proposed Class and warrants the Court's approval. Proposed Class Counsel's support for the proposed settlement confers a presumption of correctness. *See Rodriguez*, 563 F.3d at 965 ("This circuit has long deferred to the private consensual decision of the parties.") (citing *Hanlon*, 150 F.3d at 1027). *See also Linney v. Cellular Alaska P'ship*, C-96-3008 DLJ, 1997 WL 450064, at \*5 (N.D. Cal. July 18, 1997) ("The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair."), *aff'd*, 151 F.3d 1234 (9th Cir. 1998); *Duhaime v. John Hancock Mut. Life. Ins. Co.*, 177 F.R.D. 54, 68 (D. Mass. 1997) (settlement is presumed fair where it is the product of arm's-length negotiations); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 184 (E.D. Pa. 1997) ("Significant weight should be attributed 'to the belief of experienced counsel that the settlement is in the best interest of the class.'") (quoting *Austin v. Pa. Dep't of Corrections*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995)).

Proposed Class Counsel are experienced class action litigators who have successfully litigated complex high-tech oriented cases in the past. After weighing the risks and benefits associated with litigating this case, Proposed Class Counsel reached the opinion that proposed settlement is in the best interest of the proposed Class. (See Declarations of Mark Dearman and Seth Lehrman, attached hereto as Exhibits 2 and 3, respectively.) The Court should afford that determination considerable weight. *See id.* at 20-21. Therefore, this factor weighs in favor of preliminarily approving the terms of the proposed settlement.

1           **F.       The Reaction of Proposed Class Members to the Proposed Settlement**

2           The reaction of the Class Members to the proposed settlement is not as meaningful a  
3 consideration when the Court is determining whether to preliminarily approve settlement because  
4 notice has not been issued and Class Members are, as yet, unaware of the proposed settlement. Class  
5 Members will receive substantial, direct notice of the proposed settlement if it is preliminarily  
6 approved, and will have every opportunity to voice their opinions on every single aspect of the  
7 proposed settlement.

8           **G.       Lack of Collusion Between the Parties**

9           The trial court's evaluation of the settlement "must be limited to the extent necessary to reach  
10 a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion  
11 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and  
12 adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.  
13 1982). As discussed above, the proposed settlement is the product of extensive arms-length  
14 negotiations among well-informed, sophisticated counsel. Attorneys' fees were **never** discussed and  
15 will not be discussed until after the Claims Period, selected by the parties and approved by the Court,  
16 expires. Both sides demonstrated by their actions that they are prepared to litigate this case through  
17 final judgment, if no acceptable resolution could be reached. In short there can be no question of  
18 any collusion. Settlement negotiations were a drawn-out process over many months, utilizing the  
19 expertise and services of Magistrate Judge Corley, who has the parties' sincere thanks and  
20 appreciation for her hard efforts. *See generally Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007  
21 WL 1114010, at \*4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the  
22 settlement process confirms that the settlement is non-collusive.").

23 **IV.   THE PROPOSED NOTICE IS ADEQUATE AND SHOULD BE**  
24 **APPROVED**

25           Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class  
26 members who would be bound by the proposal." The MANUAL FOR COMPLEX LITIGATION  
27 recommends that "[o]nce the judge is satisfied as to the certifiability of the class and the results of  
28 the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a

1 formal Rule 23(e) fairness hearing is given to the class members. For economy, the notice under  
 2 Rule 23(c)(2) and the Rule 23(e) notice are sometimes combined.” MANUAL FOR COMPLEX  
 3 LITIGATION (FOURTH) §21.633. Combined notice helps to avoid confusion that separate notifications  
 4 of certification and settlement may produce. In evaluating a notice program, therefore, the relevant  
 5 question is “whether the class as a whole had notice adequate to flush out whatever objections might  
 6 reasonably be raised to the settlement.” *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th  
 7 Cir. 1993).

8 Here, the proposed notice plan mirrors the notice plan recently approved by this Court in the  
 9 Burger King litigation, if not exceeds its reach. See *Vallabhapurapu v. Burger King Corp.*, No. C  
 10 11-00667 WHA, Order Regarding Notice of Class Action and Proposed Settlement and Setting  
 11 Fairness Hearing Date (N.D. Cal. July 2, 2012) (Alsup. J.).

12 The proposed notice plan in this case is to disseminate notice to the Class by Push Notice and  
 13 by publication on the Internet. Copies of the various Notice forms are attached to the Settlement  
 14 Agreement (Ex. 1 hereto) as Exhibits A to C. The electronic Settlement Notice will be made  
 15 available via the Internet on a Settlement Website, on Asus’ website, and on Asus’ Facebook page.  
 16 The electronic notices will provide recipients with a link to the full notices posted on the Settlement  
 17 Website and a Toll-Free Number for more information or to obtain a mailed copy. And perhaps  
 18 more importantly, the Push Notice will be sent directly to each member of the Settlement Class who  
 19 continues to own and use their Transformer Prime, which they would have purchased within the past  
 20 year. The Court should, therefore, approve the proposed Notice and notice plan.<sup>5</sup>

21 **V. THE COURT SHOULD ADOPT THE PARTIES’ PROPOSED SCHEDULE**  
 22 **FOR CONSIDERING FINAL APPROVAL OF THE SETTLEMENT**

23 The parties propose to the Court a schedule that is reasonably expeditious, yet gives all  
 24 interested persons a full opportunity to learn about the proposed settlement and have their views  
 25 considered. The parties request that all notices be completed no later than December 5, 2012 or 30  
 26 days after the entry of a Conditional Approval Order. The parties further request that opening briefs

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27 <sup>5</sup> Asus has further agreed to provide CAFA notice to the appropriate state authorities following  
 28 preliminary approval.

in support of final approval of the proposed settlement be filed no later than February 13, 2012 or 30 days prior to the Final Approval Hearing date and that Class Members' objections and exclusions be filed no later than 21 days before the Final Approval Hearing date. Finally, Plaintiff respectfully requests an opportunity to file reply briefs addressing any objections ten days prior to the Final Approval Hearing date.

## **VI. CONCLUSION**

For the reasons discussed above, Plaintiff requests that the Court enter the Conditional Approval Order served herewith, which is substantially in the form attached as Exhibit D to the Settlement Agreement (Ex. 1 hereto).

DATED: October 1, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 1, 2012, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 1, 2012.

*s/ Mark Dearman*  
MARK DEARMAN

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